IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1979

* * *

NOS. 79-608 and 79-949

* * *

THE STATE OF TEXAS,
Petitioner

V.

DONALD GENE MIXON, WELDON C. DIXON, EDITH REYNOLDS, AND RUBEN COLUNGA,
Respondents

* * *

ON WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

* * *

REPLY BRIEF FOR PETITIONER

* * *

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ARGUMENT

I. PETITIONER SEEKS REVIEW OF A TEXAS COURT OF CRIMINAL APPEALS DECISION BASED SOLELY UPON FEDERAL CONSTITUTIONAL GROUNDS.

Respondents Mixon and Reynolds in their briefs in opposition urge this Court to deny the petition for writ of certiorari because the Texas Court of Criminal Appeals' decision below rested on independent and adequate state grounds, even though the opinions in these cases[1] rely solely on federal constitutional grounds. Respondents make three arguments in support of their position. The first two, discussed in part A below, are

[1]Petitioner's motion to consolidate all these cases is pending.

frivolous. The third, discussed in part B below, is without merit for four reasons.

A. The Texas Court Relied only upon Federal Law in its Opinion.

1. The mere citation of a Texas case that itself relied only on federal constitutional law does not transmute the holdings in these cases to ones based on state law.

The Texas Court of Criminal Appeals has in four recent cases granted writs of habeas corpus after applying this Court's decisions in *Burks v. United States*, 437 U.S. 1 (1978); and *Greene v. Massey*, 437 U.S. 19 (1978); *Ex parte Reynolds*, 588 S.W.2d 900 (Tex.Crim. App. 1979); *Ex parte Colunga*, 587 S.W.2d 426 (Tex. Crim.App. 1979); *Ex parte Mixon*, 583 S.W.2d 378 (Tex. Crim.App. 1979); and *Ex parte Dixon*, 583 S.W.2d 793 (Tex.Crim.App. 1979).

In *all* these cases, the Texas Court of Criminal Appeals relied *solely* upon its interpretation of federal law, particularly the Fifth Amendment to the United States Constitution, and *Burks v. United States* and *Greene v. Massey*. In its *Reynolds* opinion, the Texas court neither cited a single Texas case nor referred in any manner to any provision of the Texas Constitution. The entire basis of its holding is a retroactive application of *Burks* and *Greene* -- an application here challenged as erroneous. Under *Oregon v. Hass*, 420 U.S. 714 (1975), and many other authorities, this Court has jurisdiction to review state courts' misinterpretations of federal law.

Yet respondent Reynolds argues that, in a case not even cited in her case, *Ex parte Mixon*, 583 S.W.2d 378 (Tex.Crim.App. 1979), the Texas Court of Criminal Appeals in a footnote to the opinion "indicated state law was considered." (Brief in Opposition, manuscript at 6).

Respondent Mixon of course relies also upon this footnote in the same way. (Brief in Opposition, manuscript at 5). The incredible basis upon which respondents make this assertion is that in that footnote, the Texas Court of Criminal Appeals cited, in addition to four decisions of this Court, an earlier state decision that had held *Pate v. Robinson*, 383 U.S. 375 (1966), retroactive. That state decision, *Ex parte Halford*, 536 S.W.2d 230 (Tex.Crim.App. 1976), itself cited no state law, but only interpreted the federal constitution. Thus, this case is unlike *California v. Krivda*, 409 U.S. 33 (1972), where the Court was unable to determine whether the state decision were based solely on federal grounds because of the California Supreme Court's citation of one of its prior decisions that *"relied specifically upon both the state and federal provisions."* *Id.* at 35 (emphasis added).

Respondents' apparent opinion is that any time a state court cites a state decision in an opinion construing the federal Constitution, review by this Court is barred because there is an adequate and independent state ground for granting relief. The assertion is frivolous.

2. The existence of a Texas prohibition against double jeopardy is not an independent state ground for decision, because it was not discussed, relied upon, or even cited in the Texas opinions in these cases.

Respondents correctly point out that the Texas Constitution contains an independent prohibition against double jeopardy. Tex. Const. art. 1, §14. At the same time, respondents do not dispute that the Texas Court of Criminal Appeals has never discussed, relied upon, or even cited the Texas constitutional prohibition in any of these four double jeopardy cases. Instead, respondents' meritless contention is that the *mere existence* of these possibly alternate state bases for

denial of relief -- depending upon the unknown interpretation the Texas Court of Criminal Appeals might give them -- bars review by this Court.

Numerous states have independent strictures against search and seizure, coerced confessions, double jeopardy, fair trials, and the like. If respondents were correct, then any state which had promulgated such an independent prohibition would by the mere enactment of such a statute insulate its federally-based decisions from Supreme Court review, even though the state courts themselves did not rely upon, discuss, or even cite any state basis for that decision. To state this proposition is to refute it.

B. The Texas Court of Criminal Appeals Opinion in *White v. State* Is Not an Independent and Adequate State Ground for Relief.

In *White v. State*, 521 S.W.2d 255 (Tex.Crim.App. 1974), the Texas Court of Criminal Appeals on direct appeal reversed a judgment of conviction on the ground that the police search resulting in incriminating evidence was illegal under the Fourth Amendment to the United States Constitution. The State of Texas petitioned this Court for writ of certiorari, which was granted. In *Texas v. White*, 423 U.S. 67 (1975), this Court reversed the judgment of the Texas Court of Criminal Appeals and held, on the basis of the same federal authorities misconstrued in the court below, that the search was valid. Accordingly, the decision of the Court of Criminal Appeals was reversed, and the case remanded to that court for further proceedings not inconsistent with the opinion. 423 U.S. at 68-69.

On remand, the Court of Criminal Appeals upheld the conviction in light of this Court's holding. The Court declined to apply that portion of the Texas Constitution prohibiting unreasonable searches and seizures -- Tex. Const. art. 1, §9 -- to invalidate the search in that case.

In addition, two of the then five judges of the Court of Criminal Appeals stated in a dictum that the State of Texas should not have sought a petition for writ of certiorari in this Court in the first place. It is that dictum relied upon by respondents.

1. A majority of The Texas Court of Criminal Appeals has never endorsed the dictum quoted by respondents.

A minority of the judges of the Court of Criminal Appeals in *White v. State* quoted Tex. Const. art. 5, §26, "The State shall have no right of appeal in criminal cases," and concluded that Texas officials had violated that provision of the state constitution by seeking a petition for writ of certiorari in the case. A majority of the court refused to concur in the dictum. A majority of the Court of Criminal Appeals, in fact, has never espoused that view. The membership of the Texas Court of Criminal Appeals has since expanded to nine members. Only two of the nine have ever expressed the view, and those two have not repeated it since *White v. Texas* was decided in 1976.

2. The dictum by its own terms is inapplicable to this case, which is civil, not criminal.

The *White v. State* plurality stated that the state should not seek review by appeal or writ of certiorari from that court to this Court in any criminal case. The plurality cited several sources for its clearly articulated definition of a criminal case:

> A "criminal case" is defined to be an action, suit, or cause instituted to secure a conviction in punishment for crime, or to punish an infraction of the criminal law.

White v. State, 543 S.W.2d at 368. Clearly, *White* itself was within this definition because it was a direct appeal

from the judgment of conviction.

None of the habeas corpus applications in these cases is within the ambit of this definition. All are habeas corpus petitions. Thus, not one is a suit or cause instituted by the state to secure conviction and punishment for crime. Instead, each is a suit or cause instituted by a convicted criminal defendant to invalidate a conviction and evade punishment for crime. For that reason, the cases are civil, not criminal, under the only authoritative definition in Texas law of a "criminal case" as that term is used in Tex. Const. art. 5, §26.

3. In any event, any Texas effort to restrict the jurisdiction of this Court would be ineffective by virtue of the Supremacy Clause of the United States Constitution.

As explained above, there is no barrier in Texas law to filing the petition for writ of certiorari in this case. Even if there were, the instant writ of certiorari is authorized by 28 U.S.C. §1257(3). If state law purports to forbid an act and federal law operates to allow it, the latter controls under the Supremacy Clause of the United States Constitution:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land; and the Judges in every State shall be found thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI.

In any event, it is more than a little difficult to see how respondents' argument, even if true, would be sufficient to constitute an adequate and independent state ground for the decision in the court below as that term has been defined in *Oregon v. Hass*, 420 U.S. 714 (1975); *Duncan*

v. Tennessee, 405 U.S. 127 (1972); *Jankovich v. Indiana Toll Road Commission*, 379 U.S. 487 (1965), or any other case. An independent ground for decision refers to a ground for deciding the merits of the case. Here, respondents refer to no independent basis for the decision in their cases, but only for an allegedly independent state ground precluding this Court's *review* of the merits of those cases. For the reasons above stated, the argument is without merit.

4. The Texas Court of Criminal Appeals recently refused to apply *White v. State* to these very cases.

In the paragraphs above, Petitioner has argued that a majority of the Texas Court of Criminal Appeals has never and would never disapprove the filing of the petitions for writ of certiorari in these habeas corpus cases. Recently that opinion was vindicated.

On February 8, 1980, an application for writ of prohibition and/or writ of mandamus, *Botsford v. White*, No. 7808, was filed in the Texas Court of Criminal Appeals. For substantially identical reasons to those enumerated in respondents' briefs in opposition in these cases, the application alleged that the State of Texas was without authority under Texas law to file the petitions for writ of certiorari *in these cases, Texas v. Mixon & Dixon*, No. 79-608, and *Texas v. Reynolds & Colunga*, No. 79-949. (A certified copy of the application is on file in the office of the Clerk of this Court, Hon. Michael Rodak.)

By a margin of 6-3, the Court of Criminal Appeals on February 13, 1980, refused to order the State of Texas to refrain from taking any action in furtherance of the petitions for writ of certiorari [in these cases] or to seek withdrawal of these petitions for writ of certiorari. (A certified copy of this order is on file with Mr. Rodak, and is also attached hereto as Appendix A.)

Petitioner is confident that the entire *White v. State* argument would in any event have been given short shrift by this Court. Now that the Texas courts themselves have rejected respondents' position, it is entitled to no consideration whatsoever.

II. NO RATIONAL TRIER OF FACT COULD HAVE ACQUITTED RESPONDENT REYNOLDS AT HER FIRST TRIAL.[2]

A. The Evidence Was Amply Sufficient in any Constitutional Sense.

Petitioner does not dispute that the Constitution requires proof beyond a reasonable doubt of every element of an offense. *E.g., Ivan V. v. City of New York*, 407 U.S. 203 (1972); *In re Winship*, 397 U.S. 358 (1970). But the constitutional test for determining upon collateral attack whether this burden was met at a criminal defendant's trial is established in *Jackson v. Virginia*, 443 U.S. ___, 99 S.Ct. 2781 (1979). In a habeas corpus action, the evidence at trial is constitutionally sufficient unless it is concluded that no rational trier of fact could have found guilt beyond a reasonable doubt.

The petition for writ of certiorari herein establishes that at respondent Reynolds's first trial, "her daughter's vivid, detailed account of how her mother and another man had murdered her step-father" (Petition at 13) was augmented by a large quantity of circumstantial evidence (Petition at 3-4 n.3). It is obvious that a rational trier of fact could have found respondent Reynolds guilty of every element of the offense of murder beyond a reasonable doubt.

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[2]Only respondent Reynolds has challenged the merits of Petitioner's argument that the *Burks-Greene* cases should be applied prospectively only. (Brief in Opposition, manuscript at 10-12.) Consequently, this portion of the brief is directed only at her arguments.

B. This Court Sits to Enforce the Federal Constitution, not Texas Law.

In spite of the necessity for the reversal of respondent's initial conviction for insufficient evidence to corroborate the accomplice witness testimony under Tex. Code Crim. Proc. Ann. art. 38.17 (Vernon), the Texas Court of Criminal Appeals for the reasons stated above erred in construing *Burks* and *Greene* as mandating acquittal rather than retrial. As a matter of federal constitutional law, the evidence at respondent's trial was not insufficient. Thus, to order acquittal on the basis of *Burks* and *Greene* is an erroneous application of those cases. Texas law entitled respondent to retrial rather than acquittal prior to the holdings in these Texas double jeopardy cases. All those cases erroneously interpret *Burks* and *Greene* as mandating acquittal. The error should be corrected by this Court.

III. THE RETROACTIVITY AND SCOPE OF *BURKS* AND *GREENE* ARE QUESTIONS OF NATIONAL IMPORTANCE.

A. Texas Is Not the only State Facing this Troublesome Issue.

Respondents complain that the state has not established the national importance of this legal issue. They criticize the failure of the state to set forth reliable statistical substantiation of the actual number of persons who might be affected by holding *Burks* and *Greene* retroactive. It requires no particular clairvoyance to perceive that it is likely that other jurisdictions in addition to Texas are facing the problem of proper disposition of successful habeas applications in these circumstances.

B. To Hold *Burks* and *Greene* Prospective only would Properly Allow Retrial of *Jackson v.*

Virginia Habeas Petitioners who Successfully Challenge their Convictions.

Respondents criticize the possible collateral consequence referred to by Petitioner as "beg[ging] this Court's complicity in the harassment of a second trial." (Reynolds's Brief in Opposition, manuscript at 14; Mixon's Brief in Opposition, manuscript at 10). With all due respect, Petitioner is at a loss to understand how a successful habeas petitioner under *Jackson v. Virginia* could complain of "harassment" at a second trial that he himself obtained by virtue of challenging the sufficiency of the evidence at his first trial. A habeas petitioner could avoid the emotional trauma, expense, and harassment of the second trial by the simple expedient of electing not to challenge the first trial. The choice is no different from that faced by any convicted defendant who must decide whether to appeal his conviction.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the decisions of the Texas Court of Criminal Appeals.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

DAVID L. BOTSFORD, Petitioner	)( )( )(	
VS.	)(	ORIGINAL APPLICATION FOR WRIT OF PROHIBITION AND/OR WRIT OF MANDAMUS
MARK WHITE, Attorney General, Respondent	)( )( )(	

ORDER

On this 11th day of February, 1980, came to be considered by the Court of Criminal Appeals an Original Application for Writ of Prohibition and/or Writ of Mandamus presented to this Court by Petitioner, David L. Botsford. Said Application was not accompanied by a motion for leave to file same; but this Court has considered such application in the nature of a motion for leave to file and is of the opinion that said motion for leave to file said application should be denied.

Therefore, it is ORDERED, ADJUDGED and DECREED by the Court of Criminal Appeals that said application for Writ of Prohibition and/or Writ of Mandamus, considered as a motion for leave to file same, as aforesaid, be, and it is hereby, in all things denied.

It is so ordered this 13th day of February, 1980.

PER CURIAM

En Banc

Onion, P.J., Roberts, J., and Clinton, J. dissent.

see

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